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IN THE

Supreme Court of the United States

October Term, 1956.

No. 316

CHARLES B. SMITH, as Special Administrator of the Estate of Edward S. Ellis, Deceased,

Petitioner,

-vs-

MILTON SPERLING, HARRY M. WARNER, JACK L. WARNER, UNITED STATES PICTURES, INC., and WARNER BROS. PICTURES, INC.,

Respondents.

Brief of Respondents United States Pictures, Inc. and Milton Sperling in Opposition to Petition for Writ of Certiorari.

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> nation of who are plaintiffs and who are defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 180." (*Indianapolis v. Chase National Bank, supra,* at p. 69.)

Accordingly, we submit that it is beyond question that the District Court in the instant case had the authority to realign Warners as a party plaintiff and to dismiss the action when federal diversity jurisdiction was thereby destroyed.

The other question presented by petitioner, namely: the propriety of realigning Warners as a party plaintiff in the present case, must likewise be resolved against petitioner in view of the findings of the District Court that neither Warners, its Board of Directors or stockholders were, at any time, dominated or controlled by anyone antagonistic to the financial interests of Warners in the subject matter of this suit, or otherwise. [Findings of Fact IV and V, R. pp. 75-77; Pet. App. B, pp. 3-4.]

The existence of such antagonism of interests by those in control of the corporation has been the only basis on which this Court has refused to align the corporate defendant in a shareholder's derivative action on the side of the plaintiff-shareholder instituting the action.

Doctor v. Harrington, 196 U. S. 579 (1905);

Venner v. Great Northern Railway Co., 209 U. S. 24 (1908);

Koster v. American Lumbermens Mutual Cas. Co., 330 U. S. 518 (1947).

The principle involved is succinctly stated in the *Koster* case, at page 523, as follows:

> ". . . But jurisdiction is saved in this class of cases (shareholder derivative actions) by a special dispensation because the corporation is in antagonistic hands. *Doctor v. Harrington*, 196 U. S. 579."

The petitioner argues that, to the extent that the *Doctor* and *Venner* decisions refer to the existence of domination and control of the corporation by antagonistic interests, they were concerned only with procedural compliance with former Equity Rule 94 (now Rule 23(b) of the Federal Rules of Civil Procedure), and not with the existence of federal diversity jurisdiction. We submit that those cases will not bear such interpretation.

In the *Doctor* case, the lower court realigned the defendant corporation on the side of the plaintiff-shareholder and dismissed the action on the ground that diversity jurisdiction was thus destroyed. The single question presented to this Court was whether federal diversity jurisdiction existed. This Court held that the corporation was properly a defendant in the action in view of the *allegations of the bill (no hearing or trial had been held)* that the defendant Harrington dominated and controlled the corporation.

This interpretation of the *Doctor* case is supported by the later decision in the *Venner* case, in which this Court considered, as separate and distinct issues (1) the question of diversity jurisdiction and (2) compliance with Equity Rule 94. The only facts before the Court were those *alleged in the bill.* It was alleged that the defendant James J. Hill exercised absolute domination and control over the corporation and, thereby, realized substantial

SUBJECT INDEX

PAGE

Question presented 2

Statement 3

Summary of argument 6

Argument 7

I.

The realignment of Warners as a party plaintiff was proper in view of the facts found by the District Court 7

II.

The decision of the Court of Appeals in the present case does not conflict with the decisions of any other courts of appeals 15

III.

The present case does not involve any new principles of law and its importance is limited to the specific facts on which it is based 17

Conclusion 18

Appendix I. Federal Rules of Civil Procedure, Rule 23(b) ..... App. p. 1

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Central R.R. of New Jersey v. Mills, 113 U. S. 249	11, 12
Delaware & Hudson Co. v. Albany & Susquehanna Railroad Co., 213 U. S. 435	10, 11
Doctor v. Harrington, 196 U. S. 579	8, 9, 10, 11, 14, 16, 17, 18
East Tennessee, Virginia and Georgia R.R. Co. v. Grayson, 119 U. S. 240	12
Indianapolis v. Chase National Bank, 314 U. S. 63	7, 8, 13
J. R. A. Corporation v. Boylan, 30 Fed. Supp. 393, aff'd 109 F. 2d 1018	15, 16
Koster v. American Lumbermens Mutual Cas. Co., 330 U. S. 518	8, 9
Lavin v. Lavin, 182 F. 2d 870	15, 16
McNutt v. General Motors Acceptance Corporation, 298 U. S. 178	18
Niles-Bement Co. v. Iron Moulders Union, 254 U. S. 77	7
Schmidt v. Esquire, 210 F. 2d 908	15, 16
Swanson v. Traer, 230 F. 2d 228	15, 16
Venner v. Great Northern Railway Co., 209 U. S. 24	8, 9, 10, 11, 14, 16, 17, 18

RULES

Equity Rule 94	9, 10, 11
Federal Rules of Civil Procedure, Rule 23(b)	9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 316

CHARLES B. SMITH, as Special Administrator of the Estate of Edward S. Birn, Deceased,

Petitioner,

vs.

MILTON SPERLING, HARRY M. WARNER, JACK L. WARNER, UNITED STATES PICTURES, INC., and WARNER BROS. PICTURES, INC.,

Respondents.

Brief of Respondents United States Pictures, Inc. and Milton Sperling in Opposition to Petition for Writ of Certiorari.

The petitioner seeks review by this Honorable Court of a decision of the United States Court of Appeals for the Ninth Circuit, which affirmed that portion of a judgment of the District Court dismissing the first cause of action of the complaint in a shareholder's derivative action ostensibly brought on behalf of Warner Bros. Pictures, Inc. (hereinafter sometimes referred to as "Warners"). Federal jurisdiction was based on alleged diversity of citizenship. The District Court ordered that questions relating to its jurisdiction be tried as separate and preliminary issues and, after an extensive trial thereof, the

District Court made findings of fact from which it concluded that Warners, though named as a defendant in the complaint, should properly be aligned as a party plaintiff in the action for the purpose of determining whether the requisite diversity of citizenship existed. Since, upon such realignment, there was not complete diversity of citizenship, the first cause of action was dismissed for lack of federal jurisdiction. The Court of Appeals reviewed the District Court's findings of fact, found that they were adequately supported by the record, and affirmed the judgment of dismissal of the first cause of action.

The District Court also dismissed the second cause of action of the complaint for want of equity on the ground that United States Pictures, Inc. (hereinafter sometimes referred to as "United"), named as a defendant in the first cause of action but not named as a party in the second cause of action, was an indispensable party to the second cause of action. The Court of Appeals reversed the judgment of dismissal as to the second cause of action and remanded the case to the District Court for further proceedings in relation thereto. However, the present petition does not appear to involve this portion of the Court of Appeals' decision.

Question Presented.

The sole question presented by this case is whether, for the purpose of determining if federal diversity jurisdiction exists in a shareholder's derivative action, it is error for the District Court to realign as a party plaintiff the corporation on whose behalf the action is ostensibly brought, and who is named as a defendant in the complaint, where, contrary to the allegations of the complaint, the District Court finds after an extensive trial of the

issues that: (1) the acts complained of were performed in good faith, without fraud and were considered by the Board of Directors of the corporation to be for the best interests of the corporation; (2) the directors of the corporation acted in good faith, in the exercise of their independent business judgment and without any domination or control being exerted over them; and (3) that the corporation was not, during any relevant period, in the hands or under the control of anyone antagonistic to the financial interests of the corporation.

Statement.

The present case is a typical shareholder's derivative action, brought by a shareholder of Warners ostensibly for the benefit of Warners. The plaintiff asserted two causes of action (a third cause of action was dismissed upon stipulation of the parties) but only the first cause of action, and the dismissal thereof by the court below, is involved in this petition.

By way of formal compliance with Rule 23(b), F. R. C. P., (Appendix I) the plaintiff alleged that he was the owner of 400 shares of stock of Warners from a time prior to the acts complained of [Complaint, par. 4; R. p. 4]; that the action was not a collusive one insofar as federal jurisdiction thereof is concerned [Complaint, par. 1; R. p. 3]; and the reasons for his not making any demand upon the directors of Warners to institute this action, to wit: that such demand would be futile because all or a majority of the Board of Directors, allegedly wrongfully participated in the acts complained of and that the Board of Directors was allegedly dominated and controlled by two of the individual defendants, Harry M. Warner and Jack L. Warner. [Complaint, par. 24; R. p. 11.]

Warners, a Delaware corporation, was named as a defendant in the first cause of action, together with United, also a Delaware corporation, Milton Sperling, president and a director and stockholder of United, and Harry M. and Jack L. Warner, officers, directors and stockholders of Warners; all of the individuals named as defendants were asserted to be citizens of California.

The transaction complained of by plaintiff was the making of a certain contract between Warners and United for the production of a number of motion pictures by United, which were to be partially or completely financed by Warners and distributed by Warners. [Complaint, pars. 12 to 22; R. pp. 5-10.] It was further alleged that the contract was made pursuant to a conspiracy among the individual defendants to waste and divert the funds of Warners and enrich United and Sperling [Complaint, par. 11; R. p. 5], and that the brothers Warner, through their ownership of a controlling block of stock in Warners, control and dominate Warners and select, dominate and control the directors and officers of Warners.

After a fifteen day preliminary trial on the jurisdictional issues, which is reflected in a reporter's transcript of nearly 2,000 pages, the District Court made findings of fact [R. pp. 73-77] negating the plaintiff's allegations of fraud and conspiracy and the domination and control of Warners by the individual defendants Harry M. and Jack L. Warner, or by anyone else. These findings of fact are set forth in full in the decision of the Court of Appeals (Pet. App. B, pp. 2-5), which held that such findings were adequately supported by the record.

Briefly stated, the District Court found: (1) that the Board of Warners consisted of eleven men, of whom

defendants Harry M. and Jack L. Warner, together with a third brother not named as a defendant, were but three members; (2) that at the time of the transaction complained of, the three brothers Warner owned, in the aggregate, less than 20% of Warners' outstanding stock; (3) that neither Warners, its stockholders, directors or officers were at any time under the domination or control of the brothers Warner; (4) that neither the stockholders, directors or officers were at any time antagonistic to the financial interests of Warners; (5) that the Warners-United contract in question was made and entered into in good faith and without fraud; and (6) that in approving and authorizing said contract, the officers and directors of Warners exercised their independent business judgment that such contract was a sound business arrangement for the best present and future interests of Warners and was intended by them to be of financial benefit to Warners and its stockholders.

The District Court also found that it was not true that any of the directors or officers of Warners wrongfully participated in the transactions complained of; and that it was not true that if demand had been made upon Warners to institute an action such as this, the persons to whom such application would be made would have been disqualified from faithfully performing their duty as officers or directors because of any matters or facts set forth in the complaint, or otherwise. The District Court expressly found that Warners was not at any time referred to in, hands or under control antagonistic to the financial interests of Warners or its stockholders.

On the basis of the foregoing findings, the District Court realigned Warners as a party plaintiff in the action and, since Warners, as a plaintiff, and United, as

a defendant, were both citizens of the State of Delaware, the requisite diversity of citizenship to confer federal jurisdiction did not exist as to the first cause of action. Accordingly, it was dismissed on that ground and such dismissal was affirmed by the Court of Appeals.

Summary of Argument.

I. The District Court was required to arrange the parties to the litigation according to their sides in the dispute and, after so arranging the parties, to determine whether the requisite diversity of citizenship existed to support federal jurisdiction. The District Court was not bound by the pleadings in making such determination and when it found, after a lengthy trial of the jurisdictional question, that Warners was not dominated or controlled by persons antagonistic to Warners' financial interests, the District Court properly concluded that Warners should be placed on the side of the plaintiff and the action dismissed since federal diversity jurisdiction did not exist.

II. The decisions of the United States Courts of Appeals for the Second and Seventh Circuits cited by petitioner are not in conflict with the instant decision of the Ninth Circuit and, in fact, a recent decision of the Seventh Circuit cites and follows the decision of the District Court in this action.

III. The decision of the Ninth Circuit is merely the specific application by it of existing decisions of this Honorable Court; it is based upon findings of fact made after trial of the jurisdictional issues and will not bar or otherwise affect federal jurisdiction in any future shareholder derivative actions except to the extent that the jurisdictional facts involved therein are substantially the same as those found to exist in the instant case.

ARGUMENT.

I.

The Realignment of Warners as a Party Plaintiff Was Proper in View of the Facts Found by the District Court.

The petition presents two questions for consideration by this Court, which may fairly be paraphrased as follows: first, did the lower court act properly, under the circumstance of this case, in realigning Warners as a party plaintiff; second, does a federal court have the power to realign the parties where the effect thereof is to destroy the diversity of citizenship of the parties (this latter question apparently being presented as a general question, independent of the particular facts of this case).

The second question must, logically, be dealt with first and it requires but little discussion. The decisions of this Court explicitly uphold the authority of the federal courts to inquire into the question of whether the parties are properly aligned in the proceeding and, if they are not properly aligned, to realign them according to their sides in the dispute and determine whether federal diversity jurisdiction exists based upon such realignment.

Indianapolis v. Chase National Bank, 314 U. S. 63 (1941);

Niles-Bement Co. v. Iron Moulders Union, 254 U. S. 77 (1920).

Not only has this Court upheld such power of the federal courts to determine whether federal jurisdiction of the action exists, but it has imposed a duty on the federal courts to make such inquiry:

". . . . Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determi-

personal profit from the sale of securities which he owned to the corporation.

The Court held that, even though the relief prayed for was for the financial benefit of the corporation, the facts alleged showed that the illegal conduct and injury complained of resulted from the joint action of the corporation and Hill and, therefore, made it proper to align the corporation as a party defendant for the purpose of determining federal diversity jurisdiction. The Court cited *Doctor v. Harrington,* as directly in point on this issue of alignment of the parties and, in discussing that case, points out that the defendant Harrington had there been held (on the basis of the allegations before the Court) to have dominated and controlled the corporation and fraudulently caused it to commit the acts complained of. The Court made no reference to the *Doctor* case in connection with its consideration of whether the plaintiff had complied with Equity Rule 94 in the *Venner* case.

Accordingly, petitioner's contention that the domination and control of the corporation by Harrington in the *Doctor* case was considered only in relation to the issue of whether the plaintiff therein complied with Equity Rule 94, is at complete variance with this Court's own interpretation of that case in *Venner v. Great Northern Railway Co.*

We recognize that allegations of domination and control of the corporation in a shareholder's derivative action are relevant to the issue of the plaintiff-shareholder's compliance with Equity Rule 94 (and its present counterpart in Rule 23(b), F. R. C. P.). As this Court held in *Delaware & Hudson Co. v. Albany & Susquehanna Railroad Co.,* 213 U. S. 435 (1909), such allegations are considered to be factors excusing the necessity of mak-

ing a demand upon the corporation to institute the action. However, they are most certainly also relevant to the question of proper alignment of the defendant corporation.

Although, as the petitioner points out, the *Delaware & Hudson* decision referred to *Doctor v. Harrington* in the context of its consideration of whether Equity Rule 94 had been complied with, there is no basis for inferring from the decision that the holding in *Doctor v. Harrington* was not on the point of federal diversity jurisdiction, which was the single issue before the Court in the *Doctor* case. Furthermore, the fact that the *Delaware & Hudson* case did not involve any question of realignment of the corporate defendant, negates any inference that the Court intended to abrogate the interpretation of *Doctor v. Harrington* set forth in the *Venner* case.

We submit that allegations of domination and control of the corporation in a shareholders derivative action are relevant both to formal compliance with the rules of procedure of the federal court (Equity Rule 94, Rule 23(b), F. R. C. P.) and to the question of the proper alignment of the defendant corporation. However, as to this latter point, *the question is not one of formal compliance with the rules but, rather, of the actual facts necessary to confer jurisdiction on the federal courts.* Where, as here, the actual facts are found to be that the corporation is not dominated or controlled by any one antagonistic to its financial interests in the subject matter of the suit, the principle set forth in the *Doctor, Venner* and *Koster* cases required the realignment of Warners as a party plaintiff.

Petitioner's reliance upon *Central R.R. of New Jersey v. Mills*. 113 U. S. 249 (1885) (cited by petitioner as *New Jersey v. Mills*) and *East Tennessee, Virginia and*

Georgia R.R. Co. v. Grayson, 119 U. S. 240 (1886) (cited by petitioner as *Railroca v. Grayson*) does not support his position. Neither of those cases were shareholder derivative actions. As appears from those decisions, they were each true class actions, brought by the shareholders of the corporations involved to set aside action taken by their respective corporations which, it was alleged, was *ultra vires.* In the *Mills* case the Court described the nature of the suit as follows:

> "The bill is filed by stockholders in the New Jersey Corporation, in behalf of themselves and other stockholders similarly situated, to set aside a lease made by that Corporation, acting in concert with the other defendants, of its railroad and property, in excess of its corporate powers and in fraud of the rights of the plaintiffs. All the defendants unite in defending the acts complained of and in denying the illegality and fraud charged against them. The New Jersey Corporation is in no sense a merely formal party to the suit, *or a party in the same interests with the plaintiffs;* but is rightly and necessarily made a defendant." (113 U. S. at p. 254.) (Emphasis added.)

And the *Grayson* opinion states "We are unable to distinguish this case from that of *N. J. Cent. R.R. Co. v. Mills,* 113 U. S. 249" (119 U. S. at p. 243).

Accordingly, as this Court held, there was no basis in those cases for aligning the corporations involved on the same side as the plaintiff-shareholders since the dispute was actually between the shareholders and their respective corporations; the actions were not brought for the ostensible benefit of the corporations involved, as is true in the case at bar. In fact, petitioner's own statements in his petition recognize this distinction (Pet. pp. 6-7).

Petitioner also contends that this Court's decision in *Indianapolis v. Chase National Bank, supra*, compels the conclusion that there was an actual controversy between petitioner and Warner as to whether this action should be instituted and that such controversy made it improper to align them on the same side.

The *Indianapolis* case was not a shareholders' derivative action. It was an action by a trustee under a trust indenture, brought on behalf of bondholders of a corporation, in which the trustee attempted to test the validity of a lease arrangement entered into by the corporation and the other defendants. The plaintiff joined the corporation as a party defendant and the issue before the court was whether the corporate defendant should be aligned on the side of plaintiff. As noted above, the Court in the *Indianapolis* case held that the parties should be aligned in accordance with the actualities of the dispute. Since the Court found that the actual controversy involved was between the corporation and the other defendants, and not between the trustee and the corporation, it ordered the trustee and the corporation to be aligned on the same side, resulting in a destruction of diversity jurisdiction.

In the present case there is also no dispute between the plaintiff and Warners except to the extent that Warners has differed with petitioner as to the institution of this action. However, as indicated in the decisions cited above, the question of the proper alignment of the corporation in a shareholder's derivative action depends upon whether the corporation is in the hands of persons antagonistic to its financial interests which prevent the corporation from asserting its rights, and not upon whether the shareholder and his corporation differ on the question of

whether to assert an alleged right of the corporation. As the District Court in the present case so aptly stated:

> "For a corporation to be 'in antagonistic hands' [Koster v. Lumbermens Mutual Co., *supra*, 330 U. S. at 523], or to have a 'hostile attitude' [Cutting v. Woodward, *supra*, 255 Fed. at 635] such as would permit alignment on the side against its presumptive financial interests, surely requires more than a mere argument or difference of opinion between the corporation and the suing stockholder as to the desirability of bringing the suit. Patently, if difference of opinion were all the 'controversy' required to be shown between the stockholder and his corporation in order to preclude alignment of the latter with the plaintiff-stockholder, then there can be no occasion for all the pages of discussion of corporate domination or control, since every stockholder's derivative suit is by definition predicated upon the assumption that the corporation has refused to sue." (Pet. App. B, pp. 45-46.)

We submit, therefore, that the decision in the present case is entirely consonant with the prior decisions of this Court on the question involved. The fact that the outcome in the *Doctor* and *Venner* cases was different from that in the present case was not caused by the application of different principles of law than the Court of Appeals here applied but, rather, resulted from the record before the Court in those cases indicating that the corporations there involved were under the control of persons antagonistic to the financial interests of such corporations. In the present case it was found *as a matter of fact*, after trial of the issues, that such antagonistic interests did not exist. Accordingly, the realignment of Warner as a party plaintiff was proper.

by Warners and distributed by Warners [Complaint, pars. 14 to 21; R. pp. 6-10].[2] It was further alleged that the contract was made pursuant to a conspiracy among the individual defendants to waste and divert the funds of Warners and to enrich United and Milton Sperling [Complaint, par. 11; R. p. 5], and that the brothers Warner, through their ownership of a large block of Warner stock, control and dominate Warners, and select, dominate and control the directors and officers of Warners [Complaint, par. 10; R. pp. 4-5].

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[2]The terms of the Warners-United contract in question can be briefly summarized as follows: The contract was made in September, 1945, and provided for the production by United of six motion pictures within a period of three years which were to be exclusively distributed by Warners [R. pp. 608, 615]. Warners and United were each to furnish 50% of the cost of production of each picture [R. p. 610]. For its services as distributor of the pictures, Warners was to receive 20% of the gross receipts from domestic distribution and 25% of the gross receipts from distribution in certain foreign countries, with a schedule of distribution rates to apply to distribution in other foreign countries [R. pp. 617-618]. After the deduction of the distribution fees as aforementioned, the proceeds from distribution of the pictures were to be applied toward the reimbursement of the parties for their costs and expenses in connection with the production of the pictures (Warners to recoup its production costs and expenses, including an allocable portion of its studio overhead, before United was to receive any such reimbursement), Warners was to be reimbursed for all distribution costs and expenses incurred by it, and the balance of such proceeds was to be divided equally between Warners and United [R. pp. 619-627].

The Warners-United Contract was amended in 1947, 1950, and 1952 to extend the term thereof and to provide for additional photoplays, as to which additional photoplays Warners would furnish 100% of the financing, but as to which Warners' distribution fees were increased to 25% of the gross receipts from domestic distribution and 30% of the gross receipts from distribution in certain foreign countries; the net proceeds from the distribution of the picture were to be divided between United and Warners on the basis of 80% to Warners, and 20% to United, instead of the equal division of net proceeds as provided in the 1945 agreement [R. pp. 653-655].

II.

The Decision of the Court of Appeals in the Present Case Does Not Conflict With the Decisions of Any Other Courts of Appeals.

Petitioner asserts, as a reason for granting the writ, that the decision in the present case is in conflict with *Schmidt v. Esquire*, 210 F. 2d 908 (7th Cir., 1954); *J. R. A. Corporation v. Boylan*, 30 Fed. Supp. 393 (S. D. N. Y.), affirmed, 109 F. 2d 1018 (2d Cir., 1940), and *Lavin v. Lavin*, 182 F. 2d 870 (2d Cir., 1950).

With respect to the Seventh Circuit's views on the question here involved, the very recent case of *Swanson v. Traer*, 230 F. 2d 228 (7th Cir., 1956), shows that it is in complete accord with the instant decision of the Ninth Circuit. In the *Swanson* case, the Court of Appeals affirmed the action of the District Court in realigning the corporation as a party plaintiff in a shareholder's derivative action, with consequent destruction of federal diversity jurisdiction. It cites and quotes from the opinion of the District Court herein, reviews the same precedents as are here involved and reaches the same result as in the case at bar. It holds that the refusal of the board of directors of the corporation to institute the action upon request of the plaintiff-shareholder does not show an antagonism of interests, but merely a difference of opinion between the shareholder and his corporation as to the wisdom of bringing the action. The opinion states that, in order to prevent the realignment of the corporation as a party plaintiff, it must appear that there is a collision between the personal interests of those in control of the corporation and the interests of the corporation in the subject matter of the suit. In the present case, the findings expressly negate any such collision of interests.

Answers were filed by United and Milton Sperling [R. pp. 16-20] and by Warners and the brothers Warner [R. pp. 20-26].

When the case came on for trial, the District Court, determining that the pleadings raised a question as to the court's jurisdiction, ordered the jurisdictional issue to be tried first, together with the issue of whether the action was barred by the statute of limitations, and the parties were ordered to present evidence only as to those two issues in advance of the trial of the other issues in the case [R. p. 72].

After a fifteen day preliminary trial on these issues, which is reflected in a reporter's transcript of nearly 2000 pages, the District Court made findings of fact negating plaintiff's allegations of fraud and conspiracy and the domination and control of Warners by the individual defendants, Harry M. and Jack L. Warner, or by anyone else [Findings of Fact IV and V; R. pp. 74-77]. These findings of fact were reviewed by the Court of Appeals which held that such findings were adequately supported by the record [R. p. 669].

Briefly stated, the pertinent findings of the District Court are as follows: (1) That the Board of Warners consisted of eleven men, of whom defendants Harry M. and Jack L. Warner, together with their brother, Albert Warner, who was not named as a defendant, were but three members; (2) that at the time of the transaction complained of, the three brothers Warner owned, in the aggregate, less than 20% of Warners' outstanding stock;[3]

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[3]Actually, the three brothers Warner owned only approximately 15% of Warners' outstanding stock. [Stipulation of Facts, R. p. 28.]

In view of the *Swanson* case, there is no reason to discuss the earlier decision of the Seventh Circuit in *Schmidt v. Esquire, supra,* which was neither cited nor referred to in the *Swanson* opinion. However, it should be noted that the only comments in the *Schmidt* case on the point here involved was by way of dictum, and was not material to the decision there reached.

The decisions of the Second Circuit cited by petitioner are clearly distinguishable from the present case.

J. R. A. Corporation v. Boylan, supra, was a shareholder's derivative action brought by a New York citizen on behalf of a New Jersey corporation, against a number of the directors of the corporation many of whom were also New York citizens. Unlike the present case, the plaintiff in the *Boylan* case argued that the corporation should be aligned as a party plaintiff and, since it was actually the only real party in interest, the citizenship of the plaintiff-stockholder should be ignored in determining whether there was diversity of citizenship. The Court rejected this novel proposition of disregarding the citizenship of the actual plaintiff and dismissed the action for want of jurisdiction. Although the Court cited the *Doctor* and *Venner* cases, it is obvious that the *Boylan* decision is in no sense parallel or similar to the present case.

In *Lavin v. Lavin, supra,* the plaintiff shareholder and the corporation for whose benefit the suit was brought were both New York citizens, and, as in the *Boylan* case, the plaintiff apparently contended that the corporation should be aligned as a party plaintiff. The Second Circuit refused to order such a realignment on the basis of the decision in *Doctor v. Harrington.* The Court said that it thought the preferable rule would be automatically to align the defendant corporation as a party plaintiff ir-

(3) that neither Warners, its directors or officers were at any time under the domination or control of the three brothers Warner; (4) that neither the stockholders, directors or officers were, at any time involved in this action, antagonistic to the financial interests of Warners; (5) that the Warners-United contract in question was made and entered into in good faith and without fraud; (6) that in approving and authorizing the Warners-United contract, the officers and directors of Warners, in the exercise of their independent business judgment, considered the contract to be a sound business arrangement for the best present and future interests of Warners and was intended by them to be of financial benefit to Warners and its stockholders; (7) that it was not true that any of the directors or officers of Warners wrongfully participated in the transactions complained of, and (8) that it was not true that had demand been made upon Warners to institute an action such as this, the persons to whom such application would be made would have been disqualified from faithfully performing their duties as officers or directors because of any matter or facts set forth in the complaint or otherwise.

The District Court further expressly found that Warners was not, at any time referred to, in hands or under control antagonistic to the financial interests of Warners or its stockholders [R. pp. 76-77].

On the basis of the foregoing findings, the District Court realigned Warners as a party plaintiff in the action and since Warners, as a plaintiff, and United, as a defendant, were both citizens of the state of Delaware, the requisite diversity of citizenship did not exist as to the first cause of action of the complaint. Accordingly, the

respective of assertions of domination or control, but that the *Doctor* case had established a different rule where *antagonistic control of the corporation existed.* This view is, of course, perfectly consistent with the decision in the case at bar, the difference in result arising out of the fact that Warners was not controlled by anyone antagonistic to its interests.

III.

The Present Case Does Not Involve Any New Principles of Law and Its Importance Is Limited to the Specific Facts on Which It Is Based.

Petitioner contends that this Court should review the present case because it involves important issues which, unless resolved in favor of petitioner, will bar shareholders from invoking the jurisdiction of federal courts in derivative actions. We submit that no such widespread effect can be attributed to the case at bar.

The decision of the Court of Appeals herein involves merely the application of the long-standing principles of the *Doctor* and *Venner* cases to a specific fact situation. If and when the fact situation presented in this case is substantially duplicated in any future shareholder derivative action, whether arising in a federal court in the Ninth Circuit or in any other federal court, we believe the same result should be reached as was reached herein. However, the reason for this is not that the present case establishes a new precedent; on the contrary, the decision in the present case is based upon numerous precedents established by decisions of this Court and of other courts which have considered the question here involved.

It may be true, as suggested by the Court of Appeals, that the trial of the jurisdictional issue here involved as

first cause of action was dismissed on that ground[4] and such dismissal was affirmed by the Circuit Court of Appeals.

Much of Petitioner's Statement (Pet. Br. pp. 6-12) purports to set forth certain of the evidence before the District Court together with Petitioner's inferences and conclusions therefrom. Presumably, Petitioner has included this material in an effort to detract from the findings made by the District Court. Petitioner contended in the Court of Appeals that the findings were not supported by the evidence, but, as noted above, the Court of Appeals rejected this argument and specifically upheld the District Court's findings [R. p. 669]. We are confident that this Court would likewise reach the same conclusion as to the findings if it were to review the record.[5]

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[4]The District Court did not pass on the issue of whether the action was barred by the statute of limitations in view of its determination that federal jurisdiction was lacking.

[5]The evidence in the record to support the District Court's findings included the following: At the meeting of Warners' Board of Directors at which the Warners-United contract was approved, the individual defendants Harry M. and Jack L. Warner were not present [Pltf. Ex. 18, R. p. 605]. Of the seven directors who were at the meeting, six testified by deposition and one, Friedman, testified in person at the trial. Friedman testified that he had made an analysis of the Warners-United contract and presented this analysis to the Board of Directors at the time it approved the contract [R. pp. 453-455]. Friedman further testified that no one had suggested or requested him to vote in favor of the contract and that his vote in favor thereof was arrived at independently [R. p. 458]. Director Catchings, who had no connection with Warners except in his capacity as a Board member [R. pp. 245-246], testified that he had voted in favor of the contract in the exercise of his independent business judgment and because he thought it was a good contract for Warners to have from a business viewpoint [R. pp. 247-249, 254, 257]. Director Guggenheimer, an attorney, testified that he had voted for the contract in the exercise of his independent business judgment and that no one had directly or indirectly attempted to indicate how he should vote on the issue [R. pp. 273-276], and

a separate and preliminary question was a novel procedure. Nevertheless, such procedure conforms to the general principle that a court can and should inquire into the validity of jurisdictional allegations at any stage of the proceedings.

McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, 189 (1936).

However, we do not understand the petitioner to complain about the time of the trial of the jurisdictional issue. Rather, his complaint is that the findings of fact contradict the allegations which he made as to jurisdiction. In order to overcome the deficiency in the evidence adduced by him at the trial, petitioner would have this Court discard the established principles of the *Doctor* and *Venner* cases and adopt a new principle of law applicable to derivative actions, whereby plaintiffs, in the position of petitioner, would be guaranteed a trial on the merits in a federal court without regard to whether there was any justification for disregarding the status of the corporate defendant as the real party in interest in the litigation.

Conclusion.

It is respectfully submitted that no showing has been made by the petitioner herein which entitles petitioner to the issuance of the writ.

Respectfully submitted,

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However, the Petition for the Writ of Certiorari did not raise any question as to the adequacy of the evidence to support the findings and, under the rules of this Court,[6] the Petitioner should not now be permitted to raise any such issue.

Furthermore, at most the Petitioner has presented details of evidence (to the extent that such evidence can be identified separately from Petitioner's inferences and conclusions therefrom and his characterizations thereof)

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director Wolf gave similar testimony with respect to his decision and vote [R. pp. 287-290]. The other directors each testified that their action, in voting in favor of the contract, was also taken based upon their independent judgment and without any influence being exerted upon them [Carlisle, R. pp. 177, 182, 187-188; Perkins, R. pp. 297-298, 300, 304; Albert Warner, R. pp. 237, 239-240].

Director Friedman testified that he did not consider that the three brothers Warner had either actual or working control of Warners by virtue of their stockholdings in the company [R. pp. 490-491]. Director Catchings testified that the brothers Warner did not indicate or otherwise attempt to force on the Board of Directors the selections of the brothers Warner for membership on the Board [R. pp. 261-263].

There was also evidence that the Warners-United contract was in the normal line of Warners' business and that many of the basic provisions thereof were the same as those formulated by the legal department of Warners for use in other independent production-distribution arrangements to which Warners was a party, and that the contract involved was largely based upon a form of agreement between Warners and another independent producer, Michael Curtiz Productions [R. pp. 408-409].

At the time of trial, eight pictures had been made by United under the agreement and, even though some had not yet run their course of full distribution, all but one had been profitable [see Deft. Ex. B-2-A, R. p. 660]. The financial benefits to Warners from the pictures produced by United under the agreement, as compared with those of other independent producers whose pictures were distributed by Warners, were excellent [Deft. Ex. B-3-A, R. p. 661]. There was also testimony that Warners could expect to receive benefits under the contract, including its distribution fees, in excess of $11,000,000 [R. pp. 528-529].

[6]Supreme Court Rule 40.1(d)(2).

APPENDIX I.

Rule 23(b), Federal Rules of Civil Procedure.

"In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

which he, apparently, believes conflict with the findings of the District Court. This Court has repeatedly said that it will not review a conflict of evidence or assess the weight or preponderance thereof. (See, *e.g.*, *N. L. R. B. v. Pittsburgh Steamship Co.*, 340 U. S. 498 at 503 (1951).) For the above reasons, we have not deemed it necessary to take issue with the numerous unjustified inferences and conclusions from the evidence set forth in Petitioner's Statement and elsewhere in his brief.

However, we must take issue with the statements of Petitioner that counsel for Warners, at the close of the trial, "*admitted* that stockholder and corporation are at odds and occupy opposing positions in the controversy over the legality of the Warner-United relationship" and conceded that Warners "was not on the complainant's but on the defendants' side of the matter in controversy" (Pet. Br. pp. 11-12). Petitioner refers to pages 587-588 of the Record to support these statements, where a colloquy between the District Court and Warners' counsel is reported. We submit that all that can be fairly inferred from the colloquy referred to is that Warners' counsel conceded that if the plaintiff had made a demand upon Warners' Board of Directors to bring this suit, the suit would not have been brought ". . . but not for the reason alleged in the complaint that there was domination; but for the reason that in the opinion of the responsible officers and directors of the corporation this was a good contract." [R. p. 588.]